IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

D.B. CIVIL SPECIAL APPEAL NO.860/1994

M/s Theatre Jwala Mandir, Rawatsar
Vs.
The State of Rajasthan & Ors.

Date of Order :: 8th August, 2006

P R E S E N T

HON'BLE THE CHIEF JUSTICE SHRI S.N. JHA
HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

::

Shri Vijay Agarwal, for the appellant.
Shri Sangeet Lodha, for the respondents.

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BY THE COURT (PER HON'BLE THE CHIEF JUSTICE)

This special appeal is directed against the order of the learned Single Judge dated 12.9.1994 in S.B. Civil Writ Petition No.4161/1994 dismissing the writ petition of the appellant.

The appellant had filed writ petition for quashing the admission rates fixed by the Sub-Divisional Magistrate, Nohar as the authority under the Rajasthan Entertainments and Advertisements Tax Act, 1957 (in short 'the Act'),

the assessment order assessing the appellant's liability under the said Act and orders passed on rectification application and revision preferred by the appellant. The case of the appellant – which is a cinema hall – is that for new cinemas constructed at municipal towns having population of less than one lac, the State Government announced a package allowing 100% remission in entertainment tax including the additional entertainment tax chargeable under the Act, in the first year of business, 50% in the second year and 25% in the third year of business. Notification to that effect under Section 7(2) of the Act was issued on 16.12.1982. The appellant-cinema started its screening business on 12.4.1984 at Rawatsar having population of less than one lac and therefore, it was entitled to remission to the extent of 100% in the first year i.e.1984-85, 50% in the second year i.e. 1985-86 and 25% in the third year i.e.1986-87. The dispute in the present case, it may be stated, relates to the year 1986-87. For the year 1986-87, the admission rates were fixed by the Sub-Divisional Magistrate being the licensing authority vide his letter dated 31.3.1987 taking into account 25% remission allowed for the year. The admission fee and

entertainment tax respectively were fixed for different classes as under :

S.No.	Class	Admission fee **Rs.**	Entertainment Tax **Rs.**	Total **Rs.**
1.	Box	3.40	2.55	5.95
2.	Balcony	2.85	2.15	5.00
3.	Upper	2.00	1.50	3.50
4.	Lower	1.10	0.85	1.95

Case of the appellant is that the entertainment tax under Section 4(1) of the Act is leviable at a rate not exceeding 100% of the admission fee. The benefit of remission in tax has to go to the cinema owner and therefore, it was entitled to retain the amount comprising 25% of the entertainment tax. However by reason of wrong fixation of rates by the Sub-Divisional Magistrate the appellant deposited Rs.2.55 for Box, Rs.2.15 for Balcony, Rs.1.50 for Upper Class and Rs. 0.85 for Lower Class as tax as per the order of Sub-Divisional Magistrate even though it was entitled to retain 25% of it by way of remission. The appellant, in the circumstances, claimed refund of the excess amount deposited by it as entertainment tax which was refused by the assessing officer. The appellant filed application for rectification and then revision against the assessment order. Those remedies having gone in vain, the appellant

filed writ petition which was too dismissed by the learned Single Judge, it has now come to Division Bench in this appeal.

It is relevant to mention here that against similar assessment for the year 1985-86, the appellant had filed S.B. Civil Writ Petition No.4154/1992 which was dismissed by identical order on the same day i.e. 12.9.1994. The appellant then filed D.B. Civil Special Appeal No.870/1994 which was also dismissed albeit ex-parte but by a speaking order on 10.3.2003.

We heard counsel for the appellant notwithstanding the fact that assessment for preceding year 1985-86 stands confirmed by reason of dismissal of the writ petition as well as the special appeal. As indicated above, the appeal was dismissed in absence of the appellant's counsel even though by a speaking order.

Shri Vijay Agarwal appearing for the appellant submitted that remission scheme was intended to provide incentive to the owners of new cinema halls. The Remission Scheme notified under Section 7(2) of the Act vide S.O. 50 dated 27.6.1987 as amended by S.O. 158 dated 1.11.1988, entitled the cinema owner to retain 50% or 25% of tax, as the case may be, and deposit only the balance amount. The entire tax having been

deposited by mistake, the appellant was entitled to refund of the amount to the extent of remission. Reference was made to clause (5.5) of S.O. 50 dated 27.6.1987 which runs as under :-

> "(5.5) The Cinema-owner will retain the amount of remission covered by the authorization permitted under this notification and shall deposit the balance amount of entertainment tax as per provisions of the Act, the Rules and the notifications issued thereunder."

Reference to S.O. 50 dated 27.6.1987 appears to be totally misplaced, for, the scheme notified by the said order/notification was applicable from the date of its publication i.e.27.6.1987 to 31.3.1992. Clause 2(i) of the notification defined 'New Cinema' to mean a cinema newly constructed during the immediate preceding one year from the date of issue of the notification making commercial exhibition of a film after 31.3.1987 but before 1.4.1988. The appellant-cinema hall, it would appear, did not come within the ambit of the above definition. As a matter of fact, the entire case of the appellant is totally misconceived.

Section 4 of the Act provides for levy of tax on payment for admission to an entertainment and lays down, inter alia, that entertainment tax shall be levied, charged and paid to the State

Government on all payments for admission to an entertainment, a tax at such rate not exceeding 100 percent of the payment for admission, as may be notified by the State Government from time to time. The tax shall be levied and paid to the State Government also on every complimentary ticket issued by the proprietor for every entertainment, as if full payment had been made for admission to such entertainment according to the class of seat or accommodation subject to certain exceptions, which are not necessary to notice for the purpose of this case. The question is whether the tax chargeable and payable to the State Government under Section 4 of the Act can be retained by owner of the cinema hall ?

The question is squarely covered by the decision of the Apex Court in Amrit Banaspati Co. Ltd. & Anr. Vs. State of Punjab & Anr., (1992) 2 SCC 411. That was a case of grant of tax concession to new industrial units set-up pursuant to promise/representation of the government to the effect that new units shall be entitled to certain concessions. One of the concessions was in the form of refund sales tax. The appellant claimed refund of sales tax paid by it to the State Government on sale made by it of its finished products. Upholding the plea of promissory

estoppel, in principle, the Supreme Court held that promissory estoppel is an extension of principle of equity, the basic purpose of which is to promote justice founded on fairness and relieve a promisee of any injustice perpetrated due to promisor's going back on its promise, but it is incapable of being enforced in a court of law if the promise which furnishes the cause of action or the agreement, express or implied, giving rise to binding contract is statutorily prohibited or is against public policy. Their Lordships observed as under :-

> "10. . . . . .
> Therefore even a legislature, much less a government, cannot enact a law or issue an order or agree to refund the tax realized by it from people in exercise of its soverign powers, except when the levy or realization is contrary to a law validly enacted. A promise or agreement to refund tax which is due under the Act and realized in accordance with law would be a fraud on the Constitution and breach of faith of the people. Taxes like sales tax are paid even by a poor man irrespective of his savings with a sense of participation in growth of national economy and development of the State. Its utilization by way of refund not to the payer but to a private person, a manufacturer, as an inducement to set up its unit in the State would be breach of trust of the people amounting to deception under law.
> **11.** Exemption from tax to encourage industrialization should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new

or expanding industries is well known to be one of the methods of grant incentive to encourage industrialization. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimately beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or orders issued by Government are neither illegal nor against public policy.

12. But refund of tax is made in consequence of excess payment of it or its realization illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realized in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realized under a statute. It would be invalid and ultra vires. . . . . To illustrate it the appellant claimed refund of sales tax paid by it to the State Government on sale made by it of its finished products. But the tax paid is not an amount spent by the appellant but realized on sale by it. What is deposited under this head is tax which is otherwise due under the provisions of the Act. Return or refund of it or its equivalent, irrespective of form is repayment or refund of sales tax. This would be contrary to Constitution. Any agreement for such refund being contrary to public policy was void under Section 23 of the Contract Act. The constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual the agreement or promise made by the government was in contravention of public purpose thus violative of public policy. No legal relationship could have arisen by operation of promissory estoppel as it was contrary both to the Constitution and the law. Realisation of tax through State

> mechanism for the sake of paying it to a private person directly or indirectly is impermissible under constitutional scheme. The law does not permit it nor equity can countenance it.
> . . . . . .”

It is to be kept in mind that entertainment tax is an indirect tax collected on behalf of the State from the viewers of the entertainment. The owner of entertainment is merely the collecting agent of the government. The law obliges it to collect the tax and deposit it with the government. The tax once paid can be refunded only if the levy is found to be illegal but where the benefit of the refund can not be made available to person from whom the tax was collected, it would be against public policy to refund the amount to be retained by the owner. Refund of any part of the tax will amount to unjust enrichment. Any amount collected as tax is meant for the exchequer and the owner of cinema has no option but to deposit the entire amount collected with the government.

The relevant part of the letter dated 31.3.1987 (supra) communicating the fixation of rates for the year 1986-87 and the proposed rates for the year 1987-88 may be extracted as under :-

Rates for the year 1986-87 **Proposed rate for 1987-88**

SN	Class	Adm. rate Rs.	Tax Rs.	Total Rs.
1.	Box	3.40	2.55	5.95
2.	Bal.	2.85	2.15	5.00
3.	Upper	2.00	1.50	3.50
4.	Lower	1.10	0.85	1.95

SN	Class	Adm. rate Rs.	Tax Rs.	Total Rs.
1.	Box	3.00	3.00	6.00
2.	Bal.	2.50	2.50	5.00
3.	Upper	1.75	1.75	3.50
4.	Lower	1.00	1.00	2.00

SN	Class	Adm. rate Rs.	Tax Rs.	Total Rs.
1.	Box	2.85	2.15	5.00
2.	Bal.	2.00	1.50	3.50
3.	Upper	1.10	0.85	1.95

Concession :

SN	Class	Adm. rate Rs.	Tax Rs.	Total Rs.
1.	Box	2.50	2.50	5.00
2.	Bal.	1.75	1.75	3.50
3.	Upper	1.00	1.00	2.00

Concession :

Complimentary :

SN	Class	Adm. rate Rs.	Tax Rs.	Total Rs.
1.	Box	-	2.55	2.55
2.	Bal.	-	2.15	2.15
3.	Upper	-	1.50	1.50
4.	Lower	-	0.85	0.85

Complimentary :

SN	Class	Adm. rate Rs.	Tax Rs.	Total Rs.
1.	Box	-	3.00	3.00
2.	Bal.	-	2.50	2.50
3.	Upper	-	1.75	1.75
4.	Lower	-	1.00	1.00

A bare glance at the above table would make it clear that while fixing the admission rates for the year 1986-87 at Rs.3.40 for Box, Rs.2.85 for Balcony, Rs.2.00 for Upper Class and Rs.1.10 for Lower Class, the tax payable was Rs.2.55, Rs.2.15, Rs.1.50 and Rs.0.85 respectively which worked out to 75% of the admission fee. The same amount was shown as payable even on complimentary tickets in accordance with Section 4

of the Act. For the year 1987-88 for which there was no remission, the tax being 100% of the admission fee was accordingly mentioned as Rs.3.00, Rs.2.50, Rs.1.75 and Rs.1.00 for Box, Balcony, Upper Class and Lower Class respectively. It is relevant to mention here that the rates were apparently fixed on the suggestion of the appellant itself vide letter dated 25.3.1987 which is evident from a bare reading of the letter.

It is one thing to claim the benefit of reduced rates but another thing to claim refund of tax already paid. Tax already paid can be refunded where its levy is held to be illegal or in case of excess payment. The present case is not one of excess payment. The object of the incentive scheme was to reduce the tax burden as is evident from the notification dated 16.12.1982 which is the basis of appellant's claim. The notification dated 16.12.1982 runs as under :-

> "Notification No.F.4(19)FD/Gr.IV/82 dated 16.12.1982
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> Whereas, the State Government is of the opinion that reasonable ground exist in doing so, in the public interest :
>
> Now, therefore, in exercise of the powers conferred by sub-section (2) of Section 7 of the Rajasthan Entertainments and Advertisements Tax Act, 1957 (Rajasthan Act 24 of 1957), the State Government hereby remits the

entertainment tax including the additional entertainments tax chargeable under the said Act, as mentioned below for the new cinemas constructed in municipal town where a population of less than one lac exist, after the issue of this notification :-

S.No.	Year	Rate of Remission
1.	First	100%
2.	Second	50%
3.	Third	25%
4.	Fourth	Nil

This concession shall be available to those new cinemas which are constructed on or before 31st March, 1987."

On a plain reading of the above, it would be manifest that 100% remission was allowed in the first year, 50% was allowed in the second year and 25% was allowed in the third year. Fixing of rates under letter dated 31.3.1987(supra) clearly reflected the remissions allowed under the notification by reducing the tax from Rs.3.00 to Rs.2.55 for Box, from Rs.2.50 to Rs.2.15 for Balcony and so on.

The remission scheme was no doubt in the nature of incentive scheme to attract viewers to see cinema shows at reduced rates. As observed in Amrit Banaspati Co. Ltd. Vs. State of Punjab (supra), quoted hereinabove, "Therefore, both the manufacturer and consumer gain, one by concession

of non-levy and other by non-payment" by allowing reduced tax. Lower admission rates not only provided the viewers opportunity to see shows at reduced rates but also apparently resulted in gain to the owners of the cinema halls because more business meant more money.

Counsel placed reliance on Tulsipur Sugar Co. Ltd. Vs. Secretary, Govt. of U.P. & Ors., (1986) 3 SCC 267. That was a case of remission in purchase tax. The Central Government fixed price of sugarcane for the factories situated in Uttar Pradesh. Cane growers felt that the price was much too low and they made representation to the State Government, which intervened in the matter and fixed sugarcane price at higher rate. According to the appellant-Sugarcane Factory, price so fixed was exorbitant. They approached the State Government bringing to its notice that they were not in a position to pay the higher sugarcane price. According to the appellant, the Chief Minister assured them that the government would grant remission in purchase tax to all factories situated in East Zone. By notification under Section 14(1) of the U.P. Sugarcane (Purchase Tax) Act, 1961, the State Government granted remission to the extent of 0.51 paise per quintal to 18

sugar factories of the area. By another notification, two more factories were granted similar remission but similar remission was not allowed to the appellant and some other factories. Thereafter they approached the High Court challenging the said notifications. They also sought mandamus to grant similar benefit of remission in purchase tax to them. The Supreme Court found that remission was granted to those sugar factories where recovery from sugarcane was low to enable them to make timely payments towards cost of sugarcane and non-payment of the cane prices affecting the supply of cane to factories. The object of remission was to provide help to such factories and the appellants being not similarly situated, were not allowed similar benefit. It would appear, the point involved in that case was entirely different from the present case and the decision lends no help to the appellant.

Reliance was also placed on State of Rajasthan & Anr. Vs. Mahaveer Oil Industries & Ors., (1999) 4 SCC 357. The dispute in that case had arisen from withdrawal of Sales Tax Incentive Scheme by notification issued by the State Government. The High Court set aside the said

notification and directed the State Government to issue eligibility certificate. The State Government approached the Supreme Court. The Supreme Court did not stay the operation of the order of High Court and the government had granted eligibility certificate and issued circular clarifying that the respondent was eligible to the benefit of Incentive Scheme. The Supreme Court ultimately decided the case in favour of the State. The Court rejected the contention of the respondent-assesseee that it had not collected sales tax under the State Act and Central Act and it should not therefore be asked to pay the tax but as in earlier case of Gopal Oil Mills, the respondent-oil mill had been allowed to retain the benefit obtained under the Incentive Scheme up to 4.4.1994 - when the Supreme Court had stayed the High Court's order, the same benefit was also allowed to the respondent to avoid discrimination. The decision is not an authority on the point of refund or retention of the amount of tax.

In view of the discussions made hereinabove, we are satisfied that the assessement order does not suffer from any illegality and the application for rectification and revision were rightly rejected by the authorities. The learned

Single Judge thus did not commit any error in dismissing the writ petition to warrant interference by the Division Bench.

In the result, the appeal is dismissed but without any order as to costs.

[MOHAMMAD RAFIQ], J. **[S.N. JHA], CJ.**

Skant/-